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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER
VIRGINIA DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER,
OPAL MAE COOK, STELLA KING, AND ALL
OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

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The central issue presented in this case is whether personal injury awards may properly be treated by the Commonwealth of Virginia as "income" in determining eligiblity for benefits under the Aid to Families with Dependent Children (AFDC) program. In enacting the lump sum rule at issue here, 42 U.S.C. § 602(a)(17), Congress referred to the receipt of "income," but did not define the term. The Court must therefore ascertain the intent of Congress and interpret such section accordingly.

The respondents point this Court to three sources of authority for ascertaining the intent of Congress: (1) the plain and ordinary meaning of "income," (2) the legislative history of the provision, and (3) the federal agency's (U.S. Department of Health and Human Services [the Department]) longstanding definition of the term. An analysis of such authorities, however, clearly supports the conclusion that Virginia's treatment of personal injury awards as "income" for purposes of the lump sum rule is consistent with Congressional intent in enacting 42 U.S.C. § 602-(a)(17).

I.

TREATMENT OF PERSONAL INJURY AWARDS AS "INCOME" SUBJECT TO THE LUMP SUM RULE IS CONSISTENT WITH THE SOCIAL SECURITY ACT

A.

The Plain And Ordinary Meaning Of "Income"

In their brief, respondents advance the argument that Congress, in enacting 42 U.S.C. § 602(a)(17), intended the word "income" to have its "plain and ordinary" meaning (Respondents' Brief at 13). Such argument presupposes that the word "income" does, in fact, have a definitive meaning. Respondents, like the court of appeals, turn to the dictionary and other general references as the most authoritative sources to determine that meaning. A thorough review of such sources, however, reveals that the word "income" is not a static term with a fixed, common meaning. Rather, it is a flexible concept which has different meanings dependent upon the connection in which it is used.

For example, the *Oxford English Dictionary, Volume V* (1961 ed.) describes income "in its usual acceptation" as "a loose and vague term; it applies equally to gross receipts and to net produce." *Id.* at 162.

The *Webster's Encyclopedic Dictionary of the English Language* (1967 ed.) provides the term's literal definition as "that which comes in." *Id.* at 431. *Webster's New International Dictionary,* (Second Ed.), declares income to be synonymous with gain, revenue and receipts. *Id.* at 1258. Likewise, *Noah Webster's Original 1828 Ed. of an American Dictionary of the English Language* states that income and revenue are often used synonymously.

The *Random House College Dictionary* (Rev. Ed. 1975) defines income as "[t]he monetary or equivalent returns that come in periodically." *Id.* at 673.

The *Encyclopedia Americana,* a common, reliable resource since 1829 declares: "[t]here are many definitions of income" 14 ENCYCLOPEDIA AMERICANA, *Income,* 843 (1986). For the common man, such term is defined as "money receipts available for expenditure," *id.,* but a businessman "will define income in a more complicated way." *Id.*

The economist's definition is different yet: the increase in one's economic power between two points in time.[1]

Finally, *Corpus Juris Secundum* defines the term generally or ordinarily to mean "all that comes in." 42 C.J.S. *Income,* 528, 529 (1944).

The inescapable conclusion, after a thorough review of the sources available to find the ordinary or common meaning of the word "income," is that there is no such universally understood or accepted meaning. The concept of "income" is

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[1] "In general terms, income is the flow of MONEY for goods accruing to an individual, groups of individuals, a firm or the economy over some time period. It may originate from the sale of productive services (as wages, interest, profits, rents . . .), it may represent a gift (e.g., a legacy from a will or income from a trust fund) or a transfer payment (e.g., a welfare check)." (Emphasis in original.) Auld, Bannock, Baxter and Rees, *The American Dictionary of Economics* 142 (1972); "Personal income is often used interchangeably with disposable income." ECONOMIC ENCYCLOPEDIA, *Income,* 186 (1973).

indeed an economic abstraction. Within that concept there are both broad and narrow meanings. Within the broader, more common meanings of the term, the proceeds from a personal injury award clearly are "money receipts available for expenditure," and "that which comes in." Such awards just as obviously represent an accretion in the recipient's *economic* power.

The word's meaning in a specific context, however, such as the complex legislative scheme at issue here, can only be determined by examining the connection in which it is used and the result intended to be accomplished. *See Heckler v. Turner,* 105 S.Ct. 1138 (1985).[2] Thus attempting to define the meaning of "income" within the context of the AFDC program by reference to the term's meaning within other unrelated and narrow contexts, such as the tax code, is inappropriate. Indeed, even its meaning in relation to its use in the tax laws is evasive and changing as this Court has long recognized.

In *Eisner v. Macomber,* 252 U.S. 189 (1920), this Court defined income as "the gain derived from capital, from labor, or from both combined." *Id.* at 207. But when faced with the question of whether money received as exemplary or punitive damages constituted gross income under § 22(a) of the Internal Revenue Code of 1939 in *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426 (1955), this Court refused to be limited by such earlier definition. This Court held that in the context of the *Eisner* case, the definition served a

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[2] *See also Kokoska v. Belford,* 417 U.S. 642, 645 (1974), (". . .[i]t is impossible to give any categorical definition to the word 'property,' nor can we attach to it in certain relations the limitations which would be attached to it in others. . . . In determining the term's scope—and its limitations—the purpose of the Bankruptcy Act must ultimately govern. . . .")

useful purpose. However, "[i]t was not meant to provide a touchstone to all future gross income questions." *Id.* at 431.[3]

> Chief Justice Cardozo has stated it thus: "The truth is that what is income in one relation may at times be principal in another. 'Words,' as we are told, 'are flexible.'"

In Re: Kaplan's Will, 88 N.Y.S. 2d 851, 853 (1949)

The respondents fail, therefore, in their search for a common and ordinary definition of income. Indeed, if one exists at all, it is a broad concept which includes that portion of a personal injury award that is money available for expenditure and which represents an increase in the recipient's *economic* power.

B.

Legislative History

In proposing the lump sum rule to Congress, the Administration was quite clear in articulating its objectives. By encouraging individual responsibility (J.A. 54, 65, 74) (Pet. App. 90) and eliminating the perverse effect of encouraging recipients of public assistance to spend money quickly to

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[3]The House of Representatives in 1918 may have expressed doubt whether compensation for sickness or injury was *required* to be included as gross income (H.R. Rep. No. 767, 65th Cong., 2d Sess. 9-10 (1918)) (Respondents' Brief at 14-15), but impliedly it conceded such payments were by specifically excluding them from consideration as gross income. In the years after 1918, the Internal Revenue Service appears to have regarded the exemption as a freeing from tax of something which would otherwise quite properly be taxed. *See* Knickerbocker, *Income Tax Treatment of Damages*, 47 Cornell Law Review, 431-432, 439 (1962); *see also*, Surrey and Warren, *The Income Tax Project of the American Law Institute*, 66 Harvard Law Review 761 (1953), which includes in the definition of income the proceeds of personal injury awards and thereafter excludes them from consideration as gross income.

retain or regain eligibility (J.A. 75)[4], the Administration attempted to conserve federal resources by targeting assistance to those most in need (J.A. 70, 71, 72, 73, 74) (Pet. App. 90). In describing the specific proposal, Secretary Schweiker repeatedly spoke in terms of the receipt of "large sums of money" received by recipients (J.A. 54, 65, 74) (Pet. App. 93) and repeatedly stated "we will *consider* it as income. . . ." *Id.* The Secretary used as examples of lump sum income such receipts as insurance proceeds, inheritances, and retroactive social security payments, *id.*, all of which fall within the broader definitions of income heretofore discussed.

Yet respondents argue that Congress intended that only payments which met some narrow, but unarticulated definition of income were intended to be included in the lump sum rule, suggesting that Congress in fact rejected the Administration's proposal. Respondents argue as evidence of this rejection that fact that neither the House nor Senate Committee documents (J.A. 24, 75) (Brief App. 24) mentions insurance proceeds" as an example of lump sum income but gives retroactive social security benefits as their sole example. The lack of an exhaustive list of examples by the Committees is paltry evidence to support the conclusion that Congress rejected the Administration's proposal. Additionally, such reference to retroactive social security benefits by the Committees is used as an example of the then existing law. When describing the proposal, however, the Committees spoke in terms of "large payments." *Id.*

It should further be noted that a number of social security payments typify precisely the type of payment respondents argue is not income. A retroactive social security disability payment, for example, is ostensibly to compensate individuals for physical or mental impairment that prevents

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[4]The document at J.A. 75 was incorrectly cited in Petitioner's Brief at p. 15. The correct citation is: *House Comm. on Ways and Means*, 97th Cong., 1st Sess., Tax Aspects of the President's Economic Program, 265-266 (1981).

substantial gainful employment. (42 U.S.C. § 423). It is not derived from "capital, from labor or effort, or both combined," represents no more or no less "profit" than a person being compensated for the loss of earning capacity by a personal injury award. Yet, respondents concede a retroactive disability payment is properly treated as income.

The most compelling evidence of Congress' aceptance of the Administration's proposal, however, lies in the fact that the language of the adopted amendment was virtually identical to that proposed by the Administration (J.A. 68). If Congress intended to reject or restrict the Administration's proposal in any way, it logically would have amended the language of the bill proposed to it by the Administration to reflect such disagreement. *See generally Young v. Community Nutrition Institute,* 90 L.Ed.2d 959 (1986). Not having done so, Congress must have intended the word "income" to have a broad meaning in accord with the clearly articulated purposes of the lump sum rule, a meaning which includes personal injury awards.

C.

The Department's Pre-OBRA Policy

Respondents also advance the argument that the Department's long-standing pre-OBRA definition of "income" in AFDC excluded personal injury awards. Thus, they argue, Congress is presumed to have been aware of such definition and must have intended that definition to continue. Respondents, however, are wrong as a matter of fact.

Prior to OBRA, the Department required certain payments to be considered as "income," such as an initial OASDI payment or industrial compensation payments which represented accumulated current benefits (J.A. 55-56). This designation was based upon a distinction between payments that represented an accumulation of benefits paid

on a regular basis, and those payments that were *non-recurring.* This position was clearly articulated by the Department in its *amicus curiae* brief in *Lockhart v. Harden,* No. C74-390A (N.D. Ga. 1974), which respondents misread and thus misinterpret. (Respondents' Brief at 26.) In that brief, the Department stated:

> Plaintiff's theory rests on this Court's decision in *Carr v. Saucier,* C.A. No. 16, 704, May 29, 1973. In that case it was held that 45 C.F.R. § 233.20(a)-(3)(ii)(c) requires that a lump sum OASDI payment representing accumulated monthly benefits be considered as a resource, not as income on *the ground that such a payment is not "regularly available."* . . . A lump sum payment such as an OASDI lump sum or a child support arrearage payment *is viewed as an accumulation of income accruing on a regular basis* and therefore countable as income.[5]
>
> (J.A. 60-61.) (Emphasis added.)

Non-recurring payments were labeled "lump sum payments" or "windfall" payments. An example of such a lump sum payment given by the Department in 1957 was a settlement of an industrial compensation claim as a result of a loss of a hand or foot—a personal injury-type award (J.A. 58). As to those lump sum payments, states were permitted the choice of treating them either as income or as a re-

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[5] *See also* Letter to Carl H. Harper from Elizabeth A. Crogg, Deputy Chief Assistance Branch (J.A. 55): "With regard to the specific issue in the present case, the initial OASDI payment has been viewed as an accumulation of income paid *on a regular basis,* and, therefore, countable as income." (Emphasis added.)

source.[6] If defined as "income" by a state, a payment such as a personal injury award would then be counted as "income" in the month of receipt and thereafter any remaining funds would be counted as a resource that could be spent without restriction. If defined by a state as a resource, it would only affect eligibility until it was spent. If spent immediately, it would likely not affect eligibility for AFDC benefits.

Thus, when the Senate Finance Committee used the phrase "any payments that meet the definition of income are counted as income in the month of receipt. . . ." to describe the then existing policy (J.A. 24), it was reflecting this long-standing Department policy. If the state chose to define a particular nonrecurring lump sum payment as "income," then for purposes of application of AFDC policy, it was so treated as described by the Senate Finance Committee.

As the Secretary himself has noted (J.A. 84) in the regulatory rulemaking process, Congress could not have intended to maintain or change a specific definition of lump sum "income" that was universally applied throughout the AFDC program since none existed. 51 Fed. Reg. 9191, 9197 (March 18, 1986). If, however, as respondents suggest, Congress enacted the lump sum rule with the intent of preserving the Department's treatment of personal injury awards, then they must have intended that personal injury awards could be treated as income subject to the lump sum rule since such treatment was consistent with the agency's longstanding policy. *Young v. Community Nutrition Institute,* 90 L.Ed.2d 959, 968 (1986).

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[6] *See* Handbook of Public Assistance Administration (J.A. 58) which deals with the ability of states to permit "lump sum payments" to be accumulated by the recipient as a personal property reserve; Letter to Constance O. Hall from Lois J. Mapp (J.A. 66) ("Based on long-standing precedent, states have historically had the option to consider nonrecurring lump sum payments as either unearned income or resources."); 51 Fed. Reg. 9191, 9197 (March 18, 1986) (J.A. 82) ("Twenty-four commentors expressed concern about this provision suggesting that flexibility remain with the states to determine whether to count payments in the nature of a windfall as income or resources.")

II.

TREATMENT OF PERSONAL INJURY AWARDS AS "INCOME" SUBJECT TO THE LUMP SUM RULE DOES NOT VIOLATE 45 C.F.R. § 233.10(a)(1) (THE EQUITABLE TREATMENT REGULATION)

In its brief in support of the Petitioner, the Department addresses the court of appeal's holding concerning the different treatment given personal injury awards and casualty loss awards as a moot point in light of the Department's new rules. These rules, the Department declares, now require states to treat awards for casualty loss and personal injury similarly. (Department's Brief at 18-19.)

Respondents challenge such rules and the interpretation of the Department.[7] This Court, however, should not be diverted from the central issue in this case, that is, the proper treatment of a lump sum personal injury award. Whether casualty loss awards are properly treated as income or resources is not an issue before this Court. Furthermore, for purposes of this appeal, neither treatment conflicts with the "equal treatment" regulation. (45 C.F.R. § 233.10(a)(1).)

Petitioner firmly believes, as he has previously argued to this Court, that Virginia's different treatment of property casualty awards and personal injury awards is rational and advances legitimate governmental objectives and is thus sustainable under established constitutional standards of

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[7] Respondents suggest in their brief that petitioner disagrees with these rules or the interpretation. Such suggestion is erroneous. Petitioner, in his opening brief, defended Virginia's policy of treating casualty loss awards and personal injury awards differently because that was Virginia's policy at the time the appeal was heard and decided by the court of appeals. The State Board of Social Services did on December 18, 1986, move to amend Virginia's policy in accordance with the Department's new rules by ordering publication of a Notice of Intent to Amend in accordance with Virginia's Administrative Process Act.

review. *Schweiker v. Wilson,* 450 U.S. 221 (1981); *Jefferson v. Hackney,* 406 U.S. 535 (1972). Such position is not inconsistent with the Department's new rule requiring property casualty awards to be treated as income subject to the lump sum rule. Indeed, Virginia's current rule and the new rule of the Department are substantially similar. The federal rule requires both personal injury and property casualty awards to be considered lump sum income, but further requires a state to disregard any amount that is earmarked and used for the purpose for which it is paid. Thus, for a recipient whose home is destroyed by fire, any award covering such loss would not be subject to the lump sum rule to the extent the money received actually is used to repair or replace the home.

Virginia's current rule regarding property casualty awards gives the recipient the same opportunity to repair or replace the home. The only difference is that the recipient will now be required to produce evidence that the funds were spent for the purpose for which they were intended whereas Virginia currently assumes that the funds will be so spent. Such assumption, which the court of appeals erroneously found objectionable, is not unreasonable or irrational. Under the Department's new rule, however, the objection of the court of appeals is met.

Respondents contend, however, that either treatment of casualty loss awards results in inequitable and arbitrary treatment because the *opportunity* to replace lost limbs, buy a healthy body, or repair pain and suffering is not available to a recipient of a personal injury award. (Respondents' Brief at 42-46.) Neither Congress, the Department, nor the petitioner can create that which is not humanly possible. To the extent that a recipient can replace a lost limb with a prothesis, however, Virginia provides for such expenses to be deducted from the amounts of the award subject to the lump sum rule. To the extent medical treatment can offer an injured recipient a return to health,

those expenses are likewise disregarded.[8] Realistically, however, there exists no way to restore pain and suffering at any price. Thus, individuals in clearly different situations are treated equally to the extent possible. To encourage recipients of personal injury awards to spend monies representing pain and suffering or lost earning capacity quickly on consumer goods or nonessential activities would do nothing to create greater equality. In fact, to require recipients of a casualty loss award to repair or replace the lost resource in order to avoid disqualification which the Department has now done, while permitting recipients of a personal injury to so spend their award on consumer goods, entertainment, or travel, would create greater inequality between the two classes.

III.

CONCLUSION

The word "income" does not have a fixed meaning but rather is a flexible concept, with both broad and narrow meanings depending on the context within which it is used. If a common, ordinary meaning exists at all, it is one which includes all that comes in and is available to be spent. It is clear, however, from the legislative history and administrative background of the lump sum rule that Congress intended the word "income" to have a broad meaning to include inheritances, gifts, social security benefits, and personal injury awards. There is no evidence that Congress intended to exclude personal injury awards from the lump

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[8] Respondents complain that even with the DEFRA revisions of 1984, (Pet. App. 64) enacted by the Virginia Board of Social Services in November 1985 and which allows for the shortening of the period of ineligibility for after incurred medical expenses, (Pet. App. 84-88) the need for special equipment or latent medical consequences may fall outside the disqualification period (Rep. Brief 44-45). Respondents ignore, however, that once requalified for AFDC, a recipient is automatically entitled to Title XIX medicaid assistance which would meet these potential medical expenses.

sum rule. For many years the Department permitted states to treat such awards as income at their discretion. Congress, presumed to be aware of such treatment, did nothing to indicate it rejected such treatment. The result is inescapable that consideration of personal injury awards as "income" subject to the lump sum rule is consistent with the Social Security Act.

The proper treatment of casualty loss awards is not before the Court. Treating personal injury awards as income, however, does not violate the equal treatment regulation, regardless of whether casualty loss awards are treated as they currently are by Virginia, or in accordance with the Department's new rule.

Respectfully submitted,

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